



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE RIGHTS OF THE TRUSTEE UNDER SECTION 67A OF THE NATIONAL BANKRUPTCY ACT.

The National Bankruptcy Act of 1898 contains a provision that has no parallel in its English or American predecessors. This is to be found in Section 67a, which is as follows:

"Claims, which, for want of record or other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be valid liens as against his estate."

In connection with this should be read Section 70, subdivision 5, whereby the Trustee is vested with the title of the bankrupt to all property which, prior to the filing of the petition, he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

As might have been expected, a difference of opinion soon arose among the different Federal Courts concerning the effect and purpose of this Section. In some of the Middle and Western Circuits it has been held that, within the scope of Section 67a, and in the light of Section 70 (5), the trustee in bankruptcy has the status of an innocent purchaser for value;¹ and that, accordingly, an unrecorded mortgage is void as against him; though it would have been valid as against the general or judgment creditors of the bankrupt.² The doctrine of these decisions is stated by Waddill, J., in *In re Thorp*, where he says that the purpose of Sections 67a and 70 (5), "clearly was to invalidate all such liens, and to this extent, to affect and rid of encumbrances the property passing to the trustee."

Apparent basis for this view is to be found in the *obiter* remarks of Mr. Chief Justice Fuller, in *Mueller v. Nugent*³ that "the filing of the petition [*i. e.* the original petition for an adjudication of bankruptcy] is a caveat to all the world, and in effect an attachment and an injunction."

The contrary view is thus expressed by Wallace, J., who spoke for the Circuit Court of Appeals for the Second Circuit:—

"The Bankruptcy Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his

¹ *In re Booth* (1900) 98 Fed., 975; 3 Am. B. R. 574.

² *In re Lukens* (1905) 138 Fed. 188; 14 Am. B. R. 683; *In re Thorp* (1902) 130 Fed. 371, 12 Am. B. R. 195; *In re Pekin Plow Co.* (1901) 112 Fed. 308; 7 Am. B. R. 369.

³ (1901) 184 U. S. 1.

creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed."¹

A series of decisions in the Western and Middle Districts of Pennsylvania, may be of interest. In *In re Butterwick*² a case of an unrecorded conditional bill of sale, unaccompanied by delivery of possession, the learned Judge rightly said, as to the trustee's position, "This is to be determined by the local law (*Hewitt v. Berlin Machine Works*)."

But a year later the learned Judge was not so sure about that. In *English v. Ross*,³ we find him saying, *obiter*:

"The position of the trustee in this respect is clearly distinguishable from that of an assignee for the benefit of creditors under the State Law, who represents only the assignor, and takes subject, to existing equities against him (*Melloy's Appeal* (1858) 32 Pa. 121, 129) or an assignee under the bankruptcy act of 1867, by reason of the new provisions which have been introduced."

But a proper inference from the opinion delivered in *In re Heckathorn*⁴ would be that the 1906 resolution of this same learned Judge was to return to the course plotted by the Supreme Court decisions, which are based on the reasoning in *In re New York Economical Printing Co.*⁵

It is believed that the Supreme Court, in the cases hereinafter referred to, has settled beyond peradventure all questions relating to the construction and interpretation of Section 67a, and established the views so well expressed by Wallace, J., in the case last mentioned above, as the law that henceforth should govern all the Circuits. Yet the subject of the trustee's relation to the outstanding equitable obligations of the bankrupt, while highly academic in most of its phases, may, possibly with profit, probably with interest, be touched upon in the light of the sharp difference of opinion, barely outlined above, regarding the construction of this unprecedented statutory provision. At all events, such a review, however imperfect, may be of assistance in illustrating the point of view of the Supreme Court and those

¹ *In re New York Economical Printing Co.* (1901) 110 Fed. 514; 6 Am. B. R. 615; to the same effect, *In re Cavagnaro* (1906) 143 Fed. 668; 16 Am. B. R. 320; *Meyer Bros. Drug Co. v. Pipkin Co.* (1905) 136 Fed. 396; 14 Am. B. R. 477; *In re U. S. Food Co.* (1906) 15 Am. B. R. 329.

² (1904) 131 Fed. 371; 12 Am. B. R. 536.

³ (1905) 140 Fed. 630; 15 Am. B. R. 370.

⁴ (1906) 144 Fed. 499; 16 Am. B. R. 467.

⁵ *Supra*.

Judges of the lower courts whose opinions it affirmed, concerning this section of our Act.

Such a review of necessity takes us back to the decisions under the English Acts, which antedated our first National bankruptcy law, and which served as a model for its framers.

Under these earlier English Acts, the fiat in bankruptcy issued out of Chancery, directed to commissioners, whose duty and power it was to summon the bankrupt before them, to gather in his personal property and to convey it by deed of bargain and sale, enrolled in one of the Courts of record at Westminster, to assignees elected by the creditors. The grantees named in this deed were thus truly the assignees of the personal property of the bankrupt, though their title came, of course, from the statute, and not the deed. The sovereign power acted directly on the title, removing it from the bankrupt, and placing it in the assignee. But the latter took only what the bankrupt had to give. "The legislature," says Cooke, "considering that the bankrupt has been guilty of a fraud, and that he is therefore an improper person to be intrusted any more with the management of his own estate, appoints other persons in the place of the bankrupt, to whom, for the safety of the creditors, the commissioners are to convey the bankrupt's effects."¹

Naturally the English Courts soon had to decide the question of the status of the assignees. Did they take the bankrupt's title to his property as any other purchaser would take it, namely, all the bankrupt's rights therein and no more, or did they take a higher right than the bankrupt? In one instance, held the English Courts, the assignees did take such a higher right, viz:—in the case of a conveyance made in fraud of creditors. The same higher right is possessed to-day by the trustee in bankruptcy.

Later, too, the assignees acquired the right to recover moneys paid to creditors where such payments, made within a certain period prior to the bankruptcy, and under certain circumstances, needless here to consider, constituted preferences. The modern trustee in bankruptcy, whether under the English Act of 1883, or the American Act of 1898, is also possessed of the same higher rights. The American trustee also has, in addition, the higher rights conferred by Section 67a, the limits of which will be hereinafter discussed. The English trustee possesses a like higher right under the English Bills of Sale Acts.² Outside

¹ Cooke on Bankruptcy, 4th ed. (1799) p. 283.

² See *Cookson v. Swire* (1884) L. R. 9 A. C. 653; Ringwood on Bankruptcy, 8th Ed. p. 94 ff.

of such cases as those, for over two centuries, at least, the English Courts have set their faces against all attempts on the part of the bankruptcy assignees to pass over the bounds within which the bankrupt by his own engagements had confined them. Space permits only the examination of a few of the many reported cases in this connection.

For example, at common law, the products of the wife's choses in action vested in the husband, if reduced by him to possession during coverture. It was several times urged on the Court of Chancery, that the husband's assignment in bankruptcy had this effect. The Court in 1690 refused its ear to this doctrine.¹ The opposite view still possessed learned Counsel, however, so it was again presented and again rejected in *Gayer v. Wilkinson* (1773),² and it required the authority of Sir William Grant, M. R., finally to free the unfortunate *feme covert* from fear of her husband's assignee.³

The learned Judge said in part:

"I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them; even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the Bankrupt was liable to. This shows they are not considered purchasers for a valuable consideration in the proper sense of the words."

The Court of Chancery in several reported instances, had before it cases where an agreement was made by the bankrupt to give a mortgage of land or chattels, and before the consummation of the agreement the adjudication took place, and cases where the mortgage though given was defective in point of form, and the defect could be cured by the execution of a supplemental instrument. Thus, where a bankrupt pledged a lease orally, and the pledgee filed a bill for the sale of the leasehold estate, Lord Loughborough held that he was entitled to this relief.⁴ In another case⁵ the bankrupt mortgaged copyhold land, but the surrender was not presented to the Lord of the Manor. The mortgagor then became bankrupt and died. After his death, the surrender was tendered, but the lord refused to accept it, because by the custom of the manor all surrenders were to be void if not presented within twelve months after they were made.

¹ *Parker v. Dykes*, 1 Eq. Cas. Abr. fol. 54 Pl. 6.

² Cited 1 Bro. C. C. 50.

³ *Mitford v. Mitford* (1803) 9 Ves. 87.

⁴ *Russell v. Russell* (1783) 1 Bro. C. C. 269.

⁵ In *Taylor v. Wheeler* (1706) 2 Vern. 564.

The Court held that the surrender should be performed, and said:

"Yet it would not do to extend a penal law in a court of equity to the prejudice of the plaintiff, who was in the nature of a purchaser by a defective conveyance, and had contracted and agreed for a security on those lands, which the other creditors had not; * * * and against the bankrupt himself the plaintiff had a plain equity."

Again, under the early acts, title passed to the assignees as of the date of the act of bankruptcy, however secret it might be. In *Billon v. Hyde*¹ a payment made by the bankrupt after the commission of a secret act of bankruptcy, but before the docket was struck, was recovered at law by the assignees. Lord Hardwicke, by reasoning which would have been a credit to any of his mediæval predecessors, but at which a highly practical lawyer like Lord Halsbury would be aghast, held that the money was impressed with a trust, and could be recovered in equity. In *Collet v. DeGolls*² Lord Talbot held that a second mortgage, taken after the secret act of bankruptcy, could be tacked, but this decision was criticised, by so sound a Chancery Judge as Lord Redesdale,³ and by Lord Erskine.⁴

It would be a vain task to discuss here all the old English cases on this subject. Enough to satisfy the most doubtful will be found cited in Bac. Abr. Title "Bankrupt, F," and Sir William Grant, M. R., was perfectly safe when he said, in 1813, that the position of the assignee was no longer open to discussion.⁵

Three later English cases, however, present points of interest:

In *Ex parte Pollard*,⁶ it appeared that the bankrupts owned certain land in Scotland, and were indebted to Pollard. They gave Pollard a memorandum to the effect that the land should stand as security for the debt, and deposited the title deeds with him. This memorandum operated as a mortgage neither under Scottish nor English law, and it appeared that the Scottish law did not recognize our equity doctrine of an equitable mortgage. Pollard filed a petition praying that the proceeds of the sale of this land be applied to the payment of his debt. The Court of Review denied the petition.⁷ On appeal, the Lord Chancellor reversed this judgment, and said:

¹ (1749) 1 Ves. Sr. 327.

² (1734) Cases Temp. Talbot 65.

³ *Latouche v. Lord Dunsany* (1803) 1 Sch. & Lefroy, 137.

⁴ *Ex parte Herbert* (1806) 12 Ves. 183.

⁵ *Grant v. Mills* (1813) 2 V. & B. 306.

⁶ *Mont & Chitty*, 239.

⁷ (1837) 3 Mont. & Ayrton 340.

"If, indeed, the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situated, or of the manner in which the courts of such countries might deal with such equities.

"The only parties resisting the creditor's claim are the assignees, who are bound by all the equities which affect the bankrupts. To deny to the creditor the benefit of this security would be an injustice which, if unavoidable, would be much to be regretted. In giving effect to it, I act upon the well known rules of equity in this country, and do not violate nor interfere with any law or rule of property in Scotland, as I only order that to be done which the parties may by that law lawfully perform."

A similar state of facts arose in *Ex parte Holthausen*,¹ the land being located in Shanghai. The Court held that the security should be enforced. JAMES, L. J. said:

"I myself, do not believe that there is any law in any civilized country in the world which says that any party to such a contract, properly evidenced, is not bound by it. If that is so, the debtors were personally bound by the contract at the moment when their liquidation commenced. They ought to have fulfilled it; and that a bill would have been filed against them in this country to have compelled them to do so, is beyond all question. In this country, in an English bankruptcy, the trustee stands in exactly the same position as the bankrupt himself stands in, and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it."

MELLISH, L. J., said:

"It appears to me that it would be in the highest degree unjust to resort to a foreign law for the purpose of making the security bad, because the foreign law is ignorant of any such security, and when nobody can tell exactly what the effect of the security would be according to the foreign law. Therefore I think this case can fairly be decided upon this ground, that looking at the nature of the security that was given, and looking at the letter of the 30th of October, 1872, by which the deeds were deposited, and which was written in London and posted in London, this ought to be construed as an English security.

"But supposing this is not so, I also agree in the ground that has been taken by the Lord Justice that this contract was personally binding upon those who signed the agreement to deposit the deeds, and who signed it as a personal contract. It is binding upon them; and I think the rule of law is, that as it is personally binding upon them, it should be carried out as against their trustee after they have become bankrupts or liquidating debtors."

Lastly comes *In re Wallis*,² where WRIGHT, J., held that the English rule, that of two assignees of the same chose in action,

¹ (1874) L. R. 9 Ch. App. 722.

² (1902) 1 K. B. 719.

he who first notifies the debtor gets title, could not be availed of by a trustee in bankruptcy. While WRIGHT, J., was undoubtedly sound in his premise, his conclusion seems wrong. If the bankrupt could at any time perfect his title, the trustee, it would seem, had equal power.

Such is and was the law of England on this subject. The decisions under all the American National Bankruptcy Acts, except the act of 1898, are also fairly uniform on the main proposition, that the assignee in bankruptcy takes only the rights of the bankrupt, save only in the cases of fraudulent conveyances and preferences,¹ and the Supreme Court in *Yeatman v. Savings Institution*² decided under the Act of 1867, set the matter finally at rest.

The mention of the last case leads us directly to Section 67a of our present Act. For, in the writer's opinion, that case was, with the cases following it, the cause of the appearance of this provision in our present Act. In connection with the growth of bankruptcy law in this country, should be considered the policy of the American States to make void as against creditors, conditional bills of sale and chattel mortgages which have not been duly filed or recorded as the case may be, in cases where delivery of the chattels covered thereby has not been transferred to the mortgagee or vendee. These statutes have a *raison d'être* founded on English common law and the Elizabethan Statute relating to fraudulent conveyances, and their genealogy may be traced back, it is conceived, to the famous *Twyne's Case*³ where it was resolved by the Court that in case of a sale of chattels the retention of possession by the vendor or donor is a badge of fraud. Among the signs and marks of fraud, the Court noted:

"The donor continued in possession and used the goods as his own and by reason thereof he traded and trafficked with others and defrauded and deceived them."

And Lord Coke, in his inimitable manner, gives the reader this advice:

¹ *Mitchell v. Winslow* (1843) 2 Story, 630; *Fed. Case* 9673; *Brett v. Carter* (1875) 2 Lowell, 458; *Fed. Case* 1844; *Stover v. Kennedy* (1878) *Fed. Case* 13510; *Wadsworth v. Tyler* (1868) *Fed. Case* 17032; *In re Wood* (1871) *Fed. Case* 17937; *Douglas v. Vogeler*, 6 *Fed. Rep.* 53; *In re Perrin* (1873) 7 N. B. R., 283, *Fed. Case* 10995; *Gattman v. Honea* (1875) 12 N. B. R., 493, *Fed. Case* 5271; *Burdick v. Jackson* (1876) 7 Hun 488.

² (1877) 95 U. S. 764.

³ (1602) 3 Coke's Reports 80.

"Immediately after the gift take possession of the goods, for continuance of possession in the donor is a sign of trust."

The long line of cases and the conflicts between them, arising out of the decision in *Twyne's case*, are well summarized in Bump on Fraudulent Conveyances,¹ and it can be asserted with confidence that the early legislators in the various American States had in mind this learning when they framed the Acts for the filing of chattel mortgages and conditional bills of sale.

This theory of the origin of these American Statutes is doubtless not novel. It is here asserted with the greater confidence because Lord Blackburn, an acknowledged master of this branch of law, attributed a similar origin to the first English Bills of Sale Act, that of 1854.² He points out that under the common law doctrine, founded on *Twyne's Case*,³ there was only a presumption of fraud in the case of a sale of chattels unaccompanied by delivery, and concludes that the object of the Statute was the cure of certain evils that arose under the operation of such a rule. It is, accordingly, provided in the present English Bills of Sale Act of 1878 (as amended by the Acts of 1882, 1890, and 1891) that an instrument covered by the terms of the Statute, and unregistered as therein provided, shall be void as against the assignor's trustee in bankruptcy as well as against his creditors.⁴

Thus the New York statute⁵ is as follows:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels * * * which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof is filed as directed in this article."

The statutes in most of the other States are very similar, so that any one of those statutes may be said to express the general policy of this country.⁶

Under the Massachusetts Insolvency Act the Supreme Court of that Commonwealth held that an unregistered chattel

¹ 4th Ed. Chap. V.

² *Cookson v. Swires* (1884) L. R., 9 A. C. 653, 664.

³ *Supra*.

⁴ Section 8. A similar provision was in the Act of 1854. See Lord Blackburn's opinion in *Cookson v. Swires*, *supra*.

⁵ Lien law, Laws of 1897, Chap. 418, Sec. 90, No. 1.

⁶ See Jones on Chattel Mortgages, Ch. VI.

mortgage was void as against the assignee in bankruptcy and the reason of this decision is stated by HOAR, J:

"At common law a mortgage of personal property without delivery would stand on no better ground than any other sale, and the policy of the law in requiring registration could hardly be made effectual under the provisions of the insolvent law if assignees were not allowed to take for the benefit of creditors property which the creditors themselves might have taken on execution, or which the debtor might have conveyed to them in satisfaction of their debts."¹

When the case of *Yeatman v. The Savings Institution*² was argued before the Supreme Court, the American Bar doubtless thought that *Bingham v. Jordan* would be followed, in view of the habitual deference of the Federal Courts, in construing the National Bankruptcy Act, to the decisions under the Massachusetts State Insolvency Law; but the Supreme Court, feeling bound by the general rule that a trustee in bankruptcy takes no higher rights than the bankrupt himself, held that an unfiled chattel mortgage was valid as against a trustee in bankruptcy, although void as to creditors up to the moment of the adjudication of bankruptcy.

There is, however, this fundamental difference between the two statutes, as is pointed out in *Denny v. Lincoln*,³ namely that the Massachusetts Insolvency Law, which was before the Court in *Bingham v. Jordan*, contained an express provision that the assignee took all that could be taken by the creditors on an execution against the bankrupt. However that may be, the fact remains that the Supreme Court in the *Yeatman* case and those following it, laid down the rule that a trustee in bankruptcy was bound by an unfiled chattel mortgage although delivery of possession did not accompany it, and although the creditors of the bankrupt before the adjudication would not have been bound by it under the common law principles. One does not require much of the historical sense to know that Section 67a of our present Act was intended to accomplish what the Supreme Court had refused to do, namely, add to the rights of the assignee over those of the bankrupt,—in addition to the right to avoid fraudulent conveyances and the right to recover preferences—the right to take into his own control property which had been conveyed under an instrument which for want of registration or filing, was, *under the State Law*, available to the general creditors of the bankrupt.

¹ *Bingham v. Jordan* (1861) 1 Allen 373.

² *Supra*.

³ (1847) 13 Metcalf 200.

In but few of the States is an unrecorded mortgage of land void as against any one save an innocent purchaser for value.¹ In any State that belongs to this small class, Section 67a would apply to an unrecorded mortgage of real estate. In the majority of States, the rule is as it obtains in New York, that an unrecorded mortgage of real property is valid as against everyone save an innocent purchaser for value,² and that a judgment creditor does not occupy, within the meaning of the statute, the position of a purchaser for value.³ In such a State Section 67a cannot apply to an unrecorded real estate mortgage unless this section confers upon the trustee the rights of an innocent purchaser for value, as was held in *In re Booth*, supra. The contrary to this has been squarely held elsewhere as well as in the northern District of New York.⁴ The latter case is especially interesting, in view of the fact that Judge RAY, who decided it, was a member of Congress at the time of the passage of the Act of 1898, and entertained, after his elevation to the Bench, views regarding the construction of Section 67a, which were decidedly at variance with the law as enunciated by the Circuit Court of Appeals in *In re New York Economical Printing Co.*⁵

Section 60b of the Act, relating to preferences, provides that the four months' period within which a transfer shall constitute a preference, shall not expire until four months after the date of the recording or registering of the transfer "if by law such recording or registering is required."⁶ In *In re Hunt*, it was held by RAY, J., that a mortgage of real estate in New York, takes effect, for the purpose of computing the four months' period, at once upon its execution without reference to its recording. The learned Judge, after citing Section 241 of the Real Property Law above quoted, said:

"In New York the registering or recording of a mortgage on real estate is not required in order to give it validity as against the mortgagor, or general, or even judgment creditors; consequently recording is not required to give it validity as against the trustee in bankruptcy."

¹ See Jones on Mortgages, Section 465.

² N. Y. Real Property Law, Section 241.

³ Jones on Mortgages, 6th Ed. Section 462; *In re U. S. Food Co.* (1906) 15 Am. B. R. 329; *In re Hunt* (1905) 139 Fed., 283; 14 Am. B. R. 416; *Jackson v. Dubois* (1808) 4 Johns, 216; *Obermeyer v. Jung* (1900) 51 App. Div., 247; *Weaver v. Edwards* (1886) 39 Hun. 233.

⁴ *In re U. S. Food Co.*, supra; and *In re Hunt*, supra.

⁵ Supra. See *In re Beede* (1903) 126 Fed. 853, in which the learned Judge follows with avowed distaste the decision of the Circuit Court of Appeals.

⁶ Supra.

Speaking of the amendments of February 5, 1903, which resulted in Section 60b standing as above quoted, he referred to the fact that when these amendments were introduced in the House, they contained after the word above, "required" the words, "or permitted, or if not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property transferred."

"Had the section become a law in this form" (continued the Judge) "the ending of the amendment would have been 'if by law such registering or recording is required or permitted,' etc.; in such case there would be no contention here on this subject. * * * The senate struck out the words 'or permit,' etc. above quoted. Did it regard these words as surplusage? This court thinks not."

He then expressed his regret that the amendment did not become a part of the Act, but very sensibly added;

"However, Courts must administer the law as they find it."

We now come to the broader field for the operation of Section 67a, namely, the cases of unfiled chattel mortgages and conditional bills of sale, covering property the possession of which remains in the mortgagor or vendor, as the case may be.

When the case of the *New York Economical Printing Co.* was before the Circuit Court of Appeals for the Second Circuit, there was wide difference of opinion as to the effect of certain apparently conflicting decisions of the New York Court of Appeals. Many of the New York Bar were of opinion that a creditor to obtain the advantage conferred upon him by the provision of the New York Lien Law, above quoted, must first reduce his claim to judgment. And so the Circuit Court of Appeals held that the trustee could maintain an action to recover property delivered under an unfiled chattel mortgage in New York only for the benefit of such creditors as had obtained judgments prior to the adjudication of bankruptcy. The Court thus spoke through WALLACE J.:

"The Bankruptcy Act does not vest the Trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do

not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt and could not then be disturbed by any of his creditors. The lien of the present mortgage would not have been valid as against the claims of the creditors, within the terms of subdivision "a" if the creditors had obtained the right to question it, but otherwise it was valid. * * * We think these provisions ought not to be extended by construction to cover cases which are not distinctly within their terms for the purpose of subverting liens which have originated in good faith, which have remained unchallenged at the time of the commencement of the bankruptcy proceedings, and which no creditor of the bankrupt could ever have attacked successfully except at the option of the debtor. We conclude, that, except as to the Reilly judgment, the lien of the mortgage was valid and that the trustee is entitled only to the amount of that judgment out of the proceeds in the registry of the Court."

To the view announced in this case the learned Court and its subordinates in its Circuit have steadily adhered.¹

And this is also the view of the Supreme Court, which has of late unequivocally held, as well as declared, the law to be that the trustee takes no higher rights than the bankrupt except in three classes of cases:²

- (1) Cases of conveyances in fraud of creditors.
- (2) Cases of preferences made void by the Bankrupt Act.
- (3) Cases of conveyances and obligations to which the bankrupt was a party, which, under the statutes of the state which have application in the premises by reason of the location of the subject matter or residence of the parties, must be recorded or filed, and in default thereof, are void or voidable as against the creditors of the bankrupt.

Hewitt v. Berlin Machine Works came up from New York and was the case of an unfiled conditional bill of sale. The lower Court held that the trustees took no title, and the Supreme Court, following the decision of the Circuit Court of Appeals in the *Printing Company* case affirmed the judgment, saying:

"We concur in this view, which is sustained by the decisions under previous bankruptcy laws, *Winsor v. McClellan* (1843) 2 Story 402; *Donaldson v. Farwell*, (1876) 93 U. S. 631; *Yeatman v. Savings Institution* (1877) 95 U. S. 764; and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors."

*Thompson v. Fairbanks*³ and *Humphrey v. Tatman*,⁴ involved the question whether the taking possession of after-acquired

¹ In re Garcewich (1902) 115 Fed. 87; In re Beede (1903) 126 Fed. 853; In re Hinsdale (1901) 111 Fed. 502; 7 Am. B. R. 85. In re International Mahogany Co. C. C. A., Second Circuit, May 22, 1906, not yet reported.

² *Hewitt v. Berlin Machine Works* (1904) 194 U. S. 296; *Thompson v. Fairbanks* (1905) 196 U. S. 516; *Humphrey v. Tatman* (1905) 198 U. S. 91; *York Mfg. Co. v. Cassell* (1906) 201 U. S. 344.

³ *Supra.*

⁴ *Supra.*

property by the creditor under the terms of the mortgage, though against the wishes and protest of the bankrupt, was good against the trustee in bankruptcy. In each case the Court held that as it viewed the State law this assumption of possession was valid against the trustee, because in the absence of the bankruptcy it would have been valid against the creditors.

In *Humphrey v. Tatman*, the Court, speaking through Mr. Justice HOLMES, said:

"The question then is one of Massachusetts law, and unfortunately the decision does not leave us free from doubt upon that point. If hereafter the Supreme Court of the State should adopt a different view from that to which we have been driven, this case would cease to be a precedent * * *."

As the Supreme Court of Massachusetts says that taking possession under the mortgage within four months would be valid as against the trustee in bankruptcy but for supposed peculiarities of the present bankruptcy law, and as *Thompson v. Fairbanks* (1905) 196 U. S. 516, although distinguishable from the present case, decides that it is valid under the present bankruptcy law if good by the laws of the State it follows that the mortgagee was entitled to keep his goods and that the judgment against him was wrong."

In *York Mfg. Co. v. Cassel*,¹ which came up from Ohio, the Court said through Mr. Justice PECKHAM:

"The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such a case the trustee in bankruptcy takes only the rights of the bankrupt, where there are no specific liens, as already stated * * *. In this case, under the authorities already cited, the York Manufacturing Company had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt and the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company."

The question whether a lien or conveyance is void as against the Trustee for want of record or for other reasons, is, under these decisions, solely one of State law. No new principle of bankruptcy law has been forced on us by legislation, and any Bankruptcy Court that pins itself to the State law will make no wrong decision under Section 67a, although, perchance, it may mistake the State Law.

An amusing instance of such a mistake has already occurred. Both Mr. Referee PRENTISS² and the New York Court of Appeals³ have decided that the Law of New York was not as WALLACE J., and his associates, in the *Printing Company* case, construed it to be, and that in fact it was not necessary for a

¹ Supra

² In re Met. Store Co. (1905) 15 Am. B. R. 119.

³ Skilton v. Coddington (1906) 185 N. Y. 80.

creditor to reduce his claim to judgment before attacking the mortgage.

It is a fair prediction that the Circuit Court of Appeals, should the question come up again, would, in view of the decision in *Skilton v. Coddington*, reach a result different from that reached in the case of the *Economical Printing Company*, but the principle of that case would not thereby be shaken.

The *Thorp*, *Lukens*, and *Booth* cases, and their like, it is submitted, do not represent the law of Section 67a. They are overruled cases and some day will no longer appear in briefs or controversial writings. And the Supreme Court in *York Mfg. Co. v. Cassell*,¹ has said of the dictum in *Mueller v. Nugent*,² that it "was made in regard to the particular facts in that case." As the particular facts in that case had nothing to do with the status of the trustee in any way whatsoever, may we not hope that the *Mueller* case will hereafter be cited, at least in that regard, for its decision only, and not its fustian?

GARRARD GLENN.

NEW YORK.

¹ *Supra*.

² *Supra*.